United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1894

B

P/S

United States Court of Appeals

For the Second Circuit.

THE UNITED STATES OF AMERICA,

Appellee,

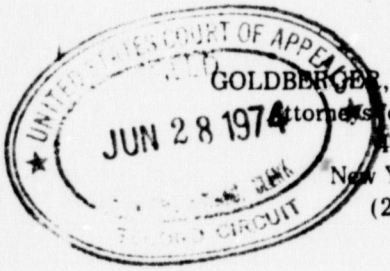
v.

RAYMOND MARQUEZ,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District of New York

Appellant's Brief



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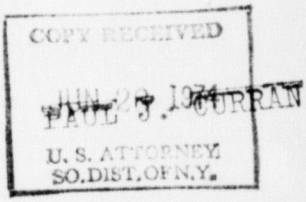

J. JEFFREY WEISENFELD
On the Brief.

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UNITED STATES COURT OF APPEALS
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THE UNITED STATES

vs.

RAYMOND MARQUEZ

APPELLANT'S BRIEF

STATEMENT OF ISSUE

Whether the oral pronouncement made by the sentencing judge at the time of sentence constitutes the judgment in this case, or whether the signed judgement and commitment and docket entries control.

PRELIMINARY STATEMENT

This is an appeal from an order of Hon. Walter R. Mansfield denying appellant's motion to correct the written judgment and commitment and the docket entries by conforming them to the oral pronouncement of sentence. This order was rendered on May 17, 1974.

STATEMENT OF FACTS

On October 22, 1969, appellant was sentenced on 69 Cr 420 to a sentence of five years imprisonment, a fine of $10,000.00 and the costs of the prosecution. (Mansfield, J.)

On February 2, 1971, appellant was sentenced to three years imprisonment on 70Cr113 (Weinfeld, J.), such sentence to begin upon completion of the five year sentence imposed on 69Cr420.

Each of the above convictions was affirmed on direct appeal.

On October 22, 1969, Judge Mansfield pronounced sentence as follows:

> In the case of defendant Marquez, the sentence of the Court is that it is adjudged that he is to be committed to the custody of the Attorney General as his authorized representative for imprisonment pursuant to his conviction on Count 2 of the indictment for a term of five years, and that he be fined in addition the sum of $10,000.00, and that he be required to pay the cost of the prosecution in this case against him. (24-25)*

In a written Judgment and Commitment, dated October 22, 1974, the sentence is stated as follows:

> Five (5) years on Count 2 and fined $10,000.00, the fine on Count 2 is to be paid or the defendant is to stand committed until the fine is paid or he is otherwise discharged according to law. It be further ordered that the defendant is to pay the cost of prosecution against him in this case. (A13a)**

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*References are to the typewritten minutes of the sentence of October 22, 1969 (69 Cr. 420).

**References are to appellant's appendix and are designated "A".

By notice of motion and motion dated May 8, 1974 and returnable on May 17, 1974, appellant moved, under Rule 36 F. R. Crim. P., to correct the judgment and the docket entries to conform to the oral statements at sentence (A1). The United States of America filed a memorandum of law which did not oppose appellant's motion. No oral argument was had.

In an order dated May 17, 1974, Judge Mansfield denied appellant's motion (A30).

ARGUMENT

THE ORAL PRONOUNCEMENTS AT THE TIME OF SENTENCING CONSTITUTE THE JUDGMENT; AND THE JUDGMENT AND THE COMMITMENT AND THE DOCKET ENTRIES SHOULD HAVE BEEN CORRECTED TO REFLECT THIS.

This issue was squarely faced by this Court in *Sobell v. United States*, 407 F2d. 190 (2d Cir. 1969). Judge Moore in his concurring opinion stated:

> It is the oral sentence which constitutes the judgment of the Court, and which is authority for the execution of the Court's sentence. The written commitment is "mere evidence of such authority". *Kennedy v. Reid*, 101 U.S. App. D.C. 400, 249 F2d. 492, 495 (1957); see also, *Pollard v. United States*, 352 U.S. 354, 360 N.4, 77 S.Ct. 481, 1 L.Ed. 2d. 393 (1957). If, as the Government would have it, appellant was sentenced not when he appeared before Judge Kaufman but at some later time when the commitment was signed, the sentence would be invalid since appellant was not present. *United States v. Johnson*,

315 F2d. 714 (2d. Cir. 1963); *James v. United States*, 348 F2d. 430, 432 (10th Cir. 1965).

It should be pointed out that while the above quotation comes from a concurring opinion it constitutes a majority position, since Judge Friendly concurred with both the grounds stated in Judge Hays' majority opinion and those stated in Judge Moore's concurring opinion.

The rule that where there is a conflict between the oral pronouncement of sentence and the written judgment and commitment or the docket entries, the oral pronouncement must control is virtually universally accepted. *United States v. Munoz-Dela Rose* — F2d—(9th Cir. 1974), (Slip op. No. 73-2930, 4/8/74); *United States v. Jarratt*, 471 F2d. 226 (9th Cir. 1972); *United States v. Hicks*, 455 F2d. 329 (9th Cir. 1972); *Henly v. Heritage*, 337 F2d. 847, 848 (5th Cir. 1964); *Rakes v. United States*, 309 F2d 686 (4th Cir. 1962).

Rule 43, F.R.Crim. P., requires that a defendant be present when sentence is pronounced; Rule 32(a)(1), F.R.Crim. P., that he be allowed to speak on his own behalf; and Rule 32(b), F.R.Crim. P., that the judgment of conviction set forth the sentence. These provisions require strict adherence to the axiom that the oral pronouncement of a legal sentence must control. *United States v. Sobell*, supra at 184, *Henley v. Heritage*, supra at 848, *United States v. Munoz-Dela Rosa*, supra.

This makes sense in practice as well. This case itself, presents a clear example of the harm which can arise if the written judgment controls. Appellant, through trial counsel, relied upon the oral sentence. It was not until almost five years later that he

was first informed of the existance of the "committed fine".[1]

The case of *Hill v. United States ex rel Wampler*, 298 U.S. 460 (1936), cited by the United States below obviously applies only to habeas corpus proceedings, where the relief is requested of a Court outside the jurisdiction of the Court which imposed sentence. As such, it may still be the law; though the subsequent enactment of 28 U.S.C. 2255 undercuts its impact.

There are some cases which imply that where the oral sentence is ambiguous, the written judgment and commitment may be used to resolve any ambiguities., e.g. *Payne v. Madigan*, 274 Fed. 702 (9th Cir. 1960), aff'd 81 S.Ct. 1670; *Boyd v. Archer*, 42 F2d. 43 (9th Cir. 1930).

These are not applicable here for three reasons. First, the oral sentence was not ambiguous; second, *this circuit has* held that where the oral sentence is ambiguous, such ambiguities must be resolved in favor of the defendant; and third, this circuit allows resort to the written judgment and commitment and docket entries only to confirm an oral sentence, not to alter it.

The oral sentence is not ambiguous.

Section 3565 of Title 18 provides:

> Where the judgment directs imprisonment until the fine is paid, the issue of execution on the judgment should not

1. This has, as alleged in the moving papers below, prevented the parole board from even reaching a determination as to the appellant's eligibility for parole.

> discharge the defendant from imprisonment until the amount of the judgment is paid.

See, *Cohen v. United States*, 82 S.Ct. 526, 528 N.2 (1962).

The oral statements of Judge Mansfield constitute a complete and clear legal sentence. The fact that there is no mention of continued imprisonment for failure to pay the fine does not render the statements ambiguous. If so, then every sentence with a fine imposed that is not a "committed fine" would be ambiguous.[2] There is nothing in the oral sentence which requires reference to another document for clarification. There isn't the slightest intimation of an intent to impose a committed fine. That appellant was required to pay the costs of prosecution, contrary to the conclusion reached in the opinion below, tends to establish that the fine was not committed. Judge Mansfield clearly set out the terms and conditions of the sentence. Such specificity leaves no room for ambiguity. In fact, the opinion below asserts none.

Furthermore, the case law is quite clear that if the direction for imprisonment is ommitted, the fine is not a committed fine. *Hill v. United States ex rel Wampler*, 98 U.S. 460 (1936). As Justice Cardozo said:

> It (imprisonment) follows, if at all, because the consequence has been prescribed in the imposition of sentence. The choice of pains and penalties, when choice is committed to the discretion of the Court, is part of judicial function. This being so, it must have expression in

2. Unless the sentencing judge had specifically stated the fine was not a committed fine.

the sentence, and the sentence is the judgment. *Miller v. Aderhold*, 288 U.S. 206, 210, 53 S.Ct. 325, 77 L.Ed. 702; *Wagner v. United States*, (9th Cir.), 3 F2d. 864; *State v. Vaughan*, 71 Conn. 457, 458, 42 A. 640; *Manke v. People*, 74 N.Y. 415, 424. 298 U.S. at 463.

U.S. v. Smith, 28 F. Supp. 726 (E.D.Pa. 1939); *U.S. v. Buchanan*, 195 F. Supp. 713 (E.D. Ky. 1961).

The oral statement of October 22, 1969, was clear and unambiguous and is the controlling sentence in this case.

Any ambiguities must be resolved in appellant's favor.

Even if it is assumed that there is some ambiguity in the oral sentence, this Court has held that such ambiguities are to be resolved in favor of the defendant. *United States v. Chiaralla*, 214 F2d. 838, 841 (2d Cir.) cert denied 348 U.S. 902 (1954); *U.S. v. Sobell*, 407 F2d. 180, 184 (2d Cir. 1969) (concurring opinion of Moore, J.); See, *Gaddis v. U.S.*, 280 F2d. 334, 335 (6th Cir. 1960).

This rule is not contradicted by cases such as *Payne v. Madigan, supra*, because the holding of *Payne* et. al. has been restricted by this Court.

The written judgment can be used only to confirm not alter the oral sentence.

Judge Moore in *U.S. v. Sobell, supra*, makes it plain that this Court restricts the holding of cases such as *Payne v. Madigan*, 274 F2d. 709 9th Cir. 1960) to situations where the written

judgment is used to *confirm* a sufficiently clear conclusion drawn from the oral pronouncement; not where it is used to alter the substance of oral pronouncements. As pointed out by Judge Moore, even the *Payne* Court "recognized that if the sentence as set forth in the written commitment departed in substance from the oral pronouncement, that sentence would be void." *U.S. v. Sobell*, supra, at 184. Here, the oral sentence is clear and would require no confirmation from the written judgment.

Appellant moved below pursuant to Rule 36 F.R.Crim.P. to correct the judgment and commitment as well as the docket entries. Other possible remedies were: Rule 35 F.R.Crim.P. (but Rule 35 is not generally applicable to collateral relief); or 28 U.S.C. 2255 (but see, *May v. U.S.*, 261 F2d. 629 (9th Cir. 1958); *Hoffman v. U.S.*, 244 F2d. 378 (9th Cir. 1957); *Cain v. U.S.*, *349 F2d 870* [*8th Cir. 1965*]].

In any event the issue was clearly raised below and if this Court decides that Rule 36 was not the appropriate remedy, it should still pass on the merits. *U.S. v. Morgan*, 346 U.S. 502 (1954); *U.S. v. Rutkin*, 212 F2d. 641 (3d Cir. 1954) (habeas corpus and coram nobis treated as a motion to vacate sentence under 28 U.S.C. 2255.).

In conclusion, the oral pronouncements were clear and constituted a legal sentence which must control over the written judgment and commitment and the docket entries. Even if there is any ambiguity, it must be resolved in favor of appellant.

CONCLUSION

THE JUDGMENT AND COMMITMENT AND THE DOCKET ENTRIES SHOULD BE CORRECTED TO REFLECT THAT THE FINE IMPOSED IS NOT A COMMITTED FINE.

Respectfully Submitted,

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